

4.1 Excessive Force—Punitive Damages

[Updated: 6/14/02]

Pattern Jury Instructions

If you find that [defendant] is liable, you may also award punitive damages to [plaintiff] under some circumstances. To obtain punitive damages, [plaintiff] must prove by a preponderance of the evidence that [defendant] either knew that [his/her] actions violated federal law or acted in reckless or callous indifference to that risk.¹ If [plaintiff] satisfies this requirement, it is entirely up to you whether or not to award punitive damages.

If you decide to award punitive damages, the amount to be awarded is also within your sound discretion. The purpose of a punitive damage award is to punish a defendant or deter a defendant and others from similar conduct in the future. Factors you may consider include, but are not limited to, the nature of the conduct (how reprehensible or blameworthy was it), the impact of that conduct on [plaintiff], the ratio between the actual compensatory damages and the punitive damages, the relationship between [plaintiff] and [defendant], the likelihood that [defendant] or others would repeat the conduct if the punitive award is not made, and any other circumstances shown by the evidence, including any mitigating or extenuating circumstances that bear on the question of the size of such an award.²

³{Respondeat Superior}

¹ In Smith v. Wade, 461 U.S. 30, 56 (1983), the Supreme Court set forth the requirements for a punitive damage award in a section 1983 case: the plaintiff must prove that the defendant had “evil motive or intent” or “reckless or callous indifference to the federally protected rights of others.” Drawing upon statements in Kolstad v. American Dental Ass’n, 527 U.S. 526, 535 (1999) (an employment discrimination decision under Title VII, which has a statutory provision for punitive damages), the First Circuit has concluded that the focus is the same under either alternative—namely, the knowledge of federal law. DiMarco-Zappa v. Cabanillas, 238 F.3d 25, 37-38 (1st Cir. 2001) (emphasis added; internal citations, quotations, and footnote omitted):

Punitive damages may be awarded under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. Such indifference pertains to the defendant's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. Although evidence of egregious or outrageous acts may support an inference of the requisite evil motive, *the guiding inquiry is whether the defendant acted in the face of a perceived risk that his actions will violate federal law.*

Accord Iacobucci v. Boulter, 193 F.3d 14, 26 (1st Cir. 1999) (citations omitted; alterations in original):

The special showing needed to trigger eligibility for punitive damages, which the Smith Court called “evil motive” or “reckless or callous indifference” pertains to the defendant’s “knowledge that [he] may be acting in violation of federal law, not [his] awareness that [he] is engaging in discrimination.” Thus, the standard requires proof that the defendant acted “in the face of a perceived risk that [his] actions [would] violate federal law.”

see also id. at 25 n.7 (“The [Kolstad] Court therefore interpreted the relevant statutory terms [of section 1981a] in lockstep with its understanding of the parallel language in Smith. Consequently, we believe that Kolstad’s teachings are fully applicable to punitive damages under section 1983.” (citations omitted)); Davis v. Rennie, 264 F.3d 86, 115-16 (1st Cir. 2001) (citing Iacobucci). Therefore, if there was any remaining basis for a punitive damage award

in a non-employment case based on “evil motive or intent” apart from the Kolstad definition geared to knowledge of federal law, it has been laid to rest in the First Circuit.

² The Supreme Court upheld a state law punitive damage instruction and verdict in 1991 in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 18 (1991), with the following cautionary observation: “One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.” The Court proceeded to say that “general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.” Id. It upheld the punitive damage verdict in Haslip after careful review of the jury instructions, noting that “the trial court expressly described for the jury the purpose of punitive damages, namely ‘not to compensate the plaintiff for any injury’ but ‘to punish the defendant’ and ‘for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future.’” Id. at 19 (alterations in original). The Court specifically pointed out, but did not indicate whether it was determinative, that “[a]ny evidence of [the defendant’s] wealth was excluded from the trial in accord with Alabama law.” Id. The Court recognized that the jury instruction:

gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury “must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.” The instructions thus enlightened the jury as to the punitive damages’ nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.

That was sufficient, given the post-trial procedures that Alabama provided for scrutinizing punitive awards where, after trial, trial or appellate judges review the culpability of the conduct, the desirability of discouraging others, the impact upon parties and other factors such as the impact on innocent third parties. Id. at 20-21. The Supreme Court explicitly declined to impose the clear and convincing evidence standard for punitive damages and upheld Alabama’s lesser standard (“reasonably satisfied from the evidence”). Id. at 23 n.11. We have tried to incorporate the Haslip criteria, such as they are, into this instruction.

In her dissent, Justice O’Connor went further:

States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more specific than “do what you think best.”

In my view, such instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollars losses are inflicted on a whim. While I do not question the general legitimacy of punitive damages, I see a strong need to provide juries with standards to constrain their discretion so they may exercise their power wisely, not capriciously or maliciously. The Constitution requires as much.

Id. at 42-43 (internal citations omitted). Justice O’Connor found the trial court’s jury instructions in Haslip wanting; they “provided no meaningful standards to guide the jury’s decision to impose punitive damages or to fix the amount. Accordingly, these instructions were void for vagueness.” Id. at 43. And even if they were not unconstitutionally vague, “they plainly offered less guidance than is required under the due process test.” Id. Finally, she concluded that post-verdict judicial review “is incapable of curing a grant of standardless discretion to the jury.” Id. Justice O’Connor did quote from the Alabama Supreme Court’s list of seven factors “that it considers relevant to the size of a punitive damages award” and said that those seven standards “could assist juries to make fair, rational decisions.” Id. at 51-52. The seven factors were:

- (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant’s conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
- (2) The degree of reprehensibility of the defendant’s conduct should be

considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

(4) The financial position of the defendant would be relevant.

(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Id. (quoting Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989)). We have not tried to incorporate factors (3) through (7) into this instruction.

Justice O'Connor reiterated her concerns in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 472 (1993) (dissent). She said there that:

juries sometimes receive only vague and amorphous guidance. Jurors may be told that punitive damages are imposed to punish and deter, but rarely are they instructed on how to effectuate those goals or whether any limiting principles exist. Although this Court has not held such instructions constitutionally inadequate, it cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict.

Id. at 474-75. Justice O'Connor expressed concern that unlike the jury instructions in Haslip, the instructions in TXO "specifically directed the jury to take TXO's wealth into account." Id. at 489. She was not willing to "say that consideration of a defendant's wealth is unconstitutional," id. at 491, but found the risk of prejudice "especially grave" where the jury was told of the out-of-state defendant's extraordinary resources estimated at \$2 billion and the primary plaintiffs' residence in the forum state. Id. at 492-93. Given the repeated emphasis on these factors in the plaintiffs' closing arguments, Justice O'Connor found it "likely, if not inescapable, that the jury was influenced unduly by TXO's out-of-state status and its large resources." Id. at 495.

The general focus of other recent Supreme Court cases on the topic of punitive damages, Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996); Honda Motors Co. v. Oberg, 512 U.S. 415 (1994); Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988), has been on the standards of appellate review for punitive damage awards, not the standards (if any) that should guide jurors. Appellate courts are instructed to consider "(1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct." Leatherman, 532 U.S. at 425 (citations omitted); accord BMW, 517 U.S. at 574-75. As the First Circuit noted in Zimmerman v. Direct Federal Credit Union, 262 F.3d 70 (1st Cir. 2001):

BMW furnishes three general guideposts for conducting such a review: (1) What is the degree of reprehensibility of the defendant's conduct? (2) What is the ratio between the compensatory and punitive damages? (3) What is the difference between the punitive damage award and the civil penalties imposed for comparable conduct?

Id. at 81 (citing BMW, 517 U.S. at 575). The first two standards are reflected in the jury instruction. We have not incorporated the third—the sanctions imposed in other cases—on the reasoning that it is more a subject for judicial, not jury, determination. In theory, however, evidence could be presented to a jury concerning sanctions imposed in other cases.

With all the attention the Supreme Court has given to the constitutionality of punitive damages under state law, apart from Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999), it has had little, if anything, to say about

the standards used in federal law cases either as a matter of constitutional law or under its supervisory powers.

³ Because a defendant may not be held liable in a section 1983 case on a theory of *respondeat superior*, see Instruction 1.1 n.3; Instruction 2.1 n.3, this instruction does not include provisions similar to those used in Title VII cases concerning the scope of an employee's employment or an employer's good-faith efforts to comply with federal law.